U.S. Department of Labor

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Issue Date: 31 May 2007

CASE NO. 2004-LHC-01656
OWCP NO. 14-132896

In the Matter of:

V. M. as widow of
D. M.,
Claimant,

vs.

CASCADE GENERAL, INC.,
Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,
Insurance Carrier.

Appearances: Charles Robinowitz
For the Claimant

John Dudrey
For the Employer and Carrier

Before: William Dorsey
Administrative Law Judge

DECISION AND ORDER

This case involves claims for additional disability and death benefits alleged to be due under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A § 901 *et seq*., (West, 2007) ("the Act"). The Claimant is the widow of an employee who injured his right knee while working for Cascade General, Inc. ("the Employer"). The Employer voluntarily paid disability benefits from April 19, 2000 until July 17, 2001.[1] The employee died in the early morning hours of April 10, 2002, in an alcohol-related single-vehicle automobile accident. On April 25, 2002,

[1] The Employer paid temporary partial disability benefits from April 19, 2000 until July 5, 2000, and from August 9, 2000 until December 26, 2000; temporary total disability benefits from July 7, 2000, until August 8, 2000, permanent partial disability benefits from December 27, 2000 until July 17, 2001; and finally a scheduled permanent partial lump sum disability benefit based on a rating of a 10% loss of use of the right leg. Employer's Exhibit 54 at 307-311; CXB 32 at 63.

the Claimant retained an attorney to pursue additional disability benefits for the decedent's knee injury. She filed a second claim that sought death benefits on June 6, 2003, asserting that the knee injury caused the fatal automobile accident because after he lost his job, the decedent began to drink excessively.

The Employer moved for summary judgment on the death-benefits claim, arguing that the Claimant had failed to file it within a year of the employee's death, as Section 13(a) of the Act requires. The Claimant countered that she met the deadline through either statutory or equitable tolling, for she had been incapacitated for months by grief. I granted summary judgment finding the death benefits claim untimely; tolling was unavailable given her deposition testimony that she had connected the death and the knee injury at the time of the motor vehicle accident. The fact that she had retained counsel well within the statutory period also weighed against her tardiness. The Claimant sought review in the Benefits Review Board, which found that her January 2005 affidavit – providing contrary evidence that she could not think about the cause of the decedent's drinking until several months after his death—raised a question of material fact about the timeliness of the death benefits claim. The Board remanded for an evidentiary hearing to consider testimony on this issue, and to determine whether any additional benefits were due for the decedent's knee injury.

On May 5, 2006, the first of two hearings was held in Portland, Oregon.[2] Claimant's exhibits ("CXA") 1-5 and 12 – 16,[3] and Employer's exhibits ("EX") 36-43, 47, 49, 50, 55, and 56 were admitted into the record. The second hearing was held on June 10, 2006, during which Claimant's exhibits ("CXB") 1-35, and Employer's Exhibits ("EX") 1-35, 51, 54, 57-60[4] were admitted into evidence. The Claimant testified as did the following witnesses who appeared on her behalf: Leah Rothwell, Shirley Weisgerber, Rene Manning, Steve Manning, Robert Rothwell, Gary Jacobsen, and vocational rehabilitation expert Andy Huckfeldt. Brent Burton, Ray Herndon, Julie Jeffers, and vocational rehabilitation expert Roy Katzen testified on the Employer's behalf.

After considering the evidence at trial, I find the death benefits claim was presented too late, and the connection between the knee injury and the drunk driving is too tenuous, but find the Employer is liable for additional benefit payments, interest on those payments and attorney's fee and costs.

STIPULATIONS

The parties stipulate and I find:

1. The claim falls within the jurisdiction the Act confers on the Secretary of Labor.

[2] The transcript for the May 5, 2006 hearing is notated as "TR1." Reference to the June 10, 2006 hearing transcript is notated as "TR2."

[3] The Claimant submitted exhibit 16 on June 16, 2006, which drew an objection from the Employer. It is admitted into the record.

[4] The Employer submitted exhibits 51, 54, and 57 on June 6, 2006; exhibits 58 and 59 on May 31, 2006; and exhibit 60 on August 23, 2006. The Claimant made no objection to any of them. They all are admitted into the record.

2. An employer/employee relationship existed between Cascade General and the decedent at the time of the knee injury.

3. The decedent's average weekly wage at the time was $1,661.98.

4. The decedent reached maximum medical improvement (MMI) for the knee injury on December 28, 2000.

5. The Claimant is entitled to the following additional compensation:

Date of disability	*Amount*	*Date interest accrued*
4/19/00 - 5/2/00	$527.92 (TPD)	May 16, 2000
12/27/00 - 12/28/00	$257.50 (TPD)	January 11, 2001
10/1/01 - 10/2/01	$257.50 (TTD)	October 16, 2001
10/19/01 - 10/20/01	$257.50 (TTD)	November 3, 2001
10/31/01 – 11/1/01	$257.50 (TTD)	November 15, 2001

6. In the event that the decedent is found to have been only partially disabled, then the Employer also concedes liability for $772.50 in temporary total disability payments, covering the six days the decedent received Hyalgan injections to his knee.

7. All additional compensation is payable to the Claimant as the personal representative of the decedent's estate.

ISSUES

1. Whether the Claimant has standing to bring this claim as a widow when she was in the process of divorcing the decedent when he died.

2. Whether the claim for death benefits is timely due to statutory or equitable tolling.

3. Whether the knee injury caused or contributed to the decedent's death.

4. The extent of the knee injury, which is a scheduled one.

FINDINGS OF FACT

Background

The decedent worked for the Employer as a boilermaker, a foreman, and as a ship superintendent. TR1 at 154. He injured his right knee on April 5, 2000 when he attempted to extinguish a fire aboard one of the Employer's barges. CXB 1. He continued working until April 19, 2000, seeking medical attention for his knee on April 24, 2000. EX 60 at 402; CX 23

at 46. On May 14, 2000, the decedent consulted an orthopedic surgeon, David Noall, M.D., who found that the decedent had torn posterior and mid-portions of the medial meniscus of his right knee, which required surgical repair that the doctor carried out on July 6, 2000. CXB 5, 7 & 9. The decedent recovered poorly. CXB 9.

The parties agree that he was unable to return to his regular work with the Employer. He worked light duty until he was laid off for lack of work on January 3, 2001. TR2 at 39. He returned to light duty from May 7, 2001 until July 21, 2001, when he was laid off a second and final time. CXB 2; EX 34 at 135-142.

During the last period of light duty, the Claimant moved from the marital home in Portland, Oregon, and later began divorce proceedings, which never became final. When the Claimant moved out she visited the decedent daily at first and then weekly after she moved to the Pacific coast because the couple shared a dog that was living with her. TR2 at 84.

The Claimant testified that she and the decedent had a good marriage until he injured his knee. Her description of him as a "workaholic" agrees with work records that show he worked 318 out of the last 365 days at his regular job. TR1 at 153; EX 5 at 6-28. The Claimant did not believe that the decedent was upset about a demotion the decedent received before his injury, for he earned more as an hourly worker than his former salary. TR1 at 196-97. She saw him become unhappy after the injury because his job had been his passion. TR1 at 155. Shirley Weisgerber, a friend of the couple, explained that he "identified himself by his job." TR2 at 65. The Claimant believed the decedent became "depressed so badly that he just kind of gave up" when he lost his job. TR2 at 85.

The decedent liked cars, "did like to go fast" in his Chevrolet Corvette and "would have liked to have been a race car driver." TR1 at 164-165. The Claimant explained that he seldom drank before the knee injury, began drinking more while he worked light duty, and then started staying out at night drinking more heavily after the light duty ended. TR1 at 158. When he began drinking heavily, the Claimant would not get in the car with him; she acknowledged telling herself and friends that she would not be surprised if he were killed because of the way he drove. TR1 at 163.

Bob Churchill, the decedent's friend, agreed that he had never been a drinker, but that he started drinking more sometime after his demotion. EX 55 at 330. During the last year to year-and-a-half of the decedent's life, Mr. Churchill remembered that the decedent drank more than he ever had before. *Id.* at 329. According to Robert Rothwell, the former husband of the Claimant's sister, the decedent drank alcohol only occasionally before his injury, but that he drank "quite a bit" after he no longer worked at the shipyard. TR1 at 69. Mr. Rothwell also recalled disabling a handgun after learning that the decedent had discharged it while drunk, which concerned him enough to warn the rest of the family of the incident. TR1 at 81.

Although the Claimant described her husband as having no hobbies, interests, or activities beside his work, the Employer proved that after his injury he maintained an interest in playing in a pool league, in his Chevrolet Corvette, his dog, his computer and his girlfriend. EX 58 at 371. The active social life the decedent maintained can be seen in what he did the night he

died. He had a drink before playing pool with his league, with Mr. Churchill and others. EX 55 at 316-317. Afterward, he and Mr. Churchill went to a bar, and then returned to his house with a few friends. *Id*. When Mr. Churchill left, the decedent returned to a bar for a nightcap. *Id* at 321. On the drive home he was crushed to death when he flipped his Corvette.[5] EX 38 at 171.

Before his death, the decedent retained an attorney to pursue a disability claim under the Act for the knee injury, Peter Preston. EX 60 at 381. Shortly after the accident, the Claimant retained Mr. Preston too. EX 57. Her sister and the sister's boyfriend accompanied her to a meeting where, according to Mr. Preston, they "kind of handled [it] for her." TR at 176; EX 60 at 390. The Claimant felt that she was "in a fog" during this time and her sister testified that the Claimant would have signed anything that was put before her. TR at 27. Mr. Preston testified that this meeting was arranged to determine whether the Claimant wished to pursue temporary total disability benefits for the knee injury. EX 57; EX 60 at 391. The decedent's alcohol consumption was discussed at the meeting, but Mr. Preston insisted that neither the Claimant nor her family members ever raised alcohol use or abuse as a concern that related to the claim for benefits. EX 60 at 392, 395. The Claimant never met with Mr. Preston again, but they kept in touch by telephone and letter. TR1 at 169.

The Claimant sold the house in Portland about four months after the decedent's death (in August 2002) and she resumed working in September or October 2002. TR1 at 166. She testified that the fog—her bereavement—lifted around this time, and she began thinking clearly again. TR1 at 168. On December 27, 2002, she wrote to Mr. Preston because she believed that her husband's estate was entitled to greater compensation for the knee injury. EX 60 at 406. Apparently unsatisfied by Mr. Preston's response that compensation was limited to the 10% rating for loss of use of the leg, she terminated his representation in favor of a new attorney, Charles Robinowitz. EX 40 at 179. On June 4, 2003, Mr. Robinowitz sent a letter notifying the Employer of the Claimant's intent to file a claim for widow's benefits on the theory that the knee injury led to depression and then to excessive drinking that caused the decedent's death. EX 40 at 180. The Employer controverted this claim on June 18, 2003, alleging that before it received Mr. Robinowitz's letter, it was unaware of any connection between the decedent's death and his job. EX 41 at 181.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vizzolo, Inc., v. Britton*, 377 F.2d 133 (D.C. Cir. 1967). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Goldsmith v. Director, OWCP* 838 F.2d 1079, 21 BRBS 30 (CRT) (9th Cir. 1988).

[5] Toxicological reports taken after the crash show that the decedent's blood alcohol concentration (BAC) was .17. CXA 5 at 17.

Death Benefits

The Claimant's standing as a widow

The Claimant must establish her status as a widow. *Meister v. Ranch Restaurant*, 8 BRBS 185 (1978), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979) (unpublished). A "widow" is the decedent's wife who lives with or is dependent on him for support at the time of his death, or lives apart from him at that time for a justifiable cause or due to his desertion. 33 U.S.C.A. § 902(16) (West, 2007). A claimant need only meet one of these conditions. *See Turnbull v. Cyr*, 188 F.2d 455 (9th Cir. 1951) (explaining that the conditions are stated in the alternative, so fulfilling any one of them qualifies a widow); *Denton v. Northrop Corp*., 21 BRBS 37 (April 29, 1988); *Griffin v. Bath Iron Works Corp.*, 25 BRBS 26 (1991). To meet the condition of living apart for justifiable cause, there must be a conjugal nexus between the claimant and decedent when the decedent dies. *Thompson v. Lawson*, 347 U.S. 334, 336-37 (1954) (explaining that a conjugal nexus exists where the claimant continues to live as a deserted wife).

The Employer argues that the Claimant is not a widow as the Act defines it because she left the marital home and filed for divorce. The Employer concedes that the decedent's affair with another woman is justifiable cause for living apart, but maintains that the Claimant's good reason for leaving, coupled with the fact that she was still legally married to him when he died, are not enough. It insists she must prove a conjugal nexus by showing that: 1) there was a continuing sexual relationship; 2) she held herself out as the decedent's spouse; and 3) she received continuing support from the decedent. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986) [citing *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975)]. This is not necessarily correct. Courts evaluate the existence of a conjugal nexus by considering all factors that tend to show a marital bond, not simply the three the Employer relies on. *See New Valley Corp. v. Gilliam,* 192 F.3d 150, 33 BRBS 179 (CRT) (D.C. Cir. 1999); *General Dynamics Corp. v. Director*, *O.W.C.P.,* 585 F.2d 1168, 1171 (1st Cir. 1980); *Kennedy v. Container Stevedoring Co.*, 23 BRBS 33 (1989).

In *Lewis*, the court considered the continuing sexual relationship the claimant had with her husband (although the claimant had engaged in liaisons with another man), as one factor indicative of a conjugal nexus. Likewise, the fact that the widow listed her phone number by her maiden name in the phone book was outweighed by evidence that she was identified by her married name at work. Despite mention of a third factor – "continuing support from the decedent" – the Board affirmed the claimant's status as a widow without any discussion of her financial dependence.[6]

[6] This is consistent with later Board decisions that consider support from the decedent as merely an indicator of a claimant's status as a widow rather than a requisite to establish a conjugal nexus. *See Denton v. Northrop Corp*., 21 BRBS 37 (1988); *Kennedy v. Container Stevedoring Co*., 23 BRBS 33 (1989). *But see Matthews*, 512 F.2d at 946 & n 12.

In *Matthews*, the Court of Appeals for the District of Columbia focused on the marital status of the claimant in terms of the "complex of circumstances" the case presented rather than on the legal formalities of the relationship. 512 F.2d at 945. The claimant had a fifteen-year relationship and child with another man after her husband had moved out of the house, yet the court found this was not enough to break the marital bond.[7] In addition to the three factors the Board borrowed in the *Lewis* case, the court considered the claimant's solicitude to her husband during his illness, his acceptance of her extra-marital relationship, the absence of either party's attempt to remarry, and the fact that the claimant never cohabitated with her boyfriend. *Id*. at 945-46. Finding a conjugal nexus, the court awarded the claimant death benefits.

Here, the Claimant and decedent were married from 1973 until the day the decedent died. TR1 at 153. The Claimant testified that the decedent "was a changed person" after he lost his job; she described him as "morose" and "depressed," and admitted that the knee injury adversely affected their sex life. TR1 at 155, 158. She explained that she could have lived with these changes and that she would not have moved out because of his drinking, although it caused her concern. TR1 at 159. She left because he was seeing another woman. *Id.*

After their separation, she returned to the house and spent the night there a few times before moving to the coast. *Id.* She returned to Portland weekly for her job and would see the decedent when she dropped off the dog that they continued to share. TR1 at 160. The couple spoke of getting back together "several times." TR2 at 84. She kept her married name, did not date anyone else, and contacted the decedent to file a joint income tax return. She visited him the day before his death to do the taxes and possibly get back together, but later admitted that she intended to confront him about tax penalties assessed for his early withdrawal of funds from a 401(k). TR1 at 162, 194. She filed for divorce because of his affair, but also to "wake him up" to stop drinking. TR1 at 161. She insisted that she hoped to reconcile. TR1 at 194.

The Employer argues that the decedent was not likely to reconcile because he was still dating his girlfriend on the night of his death. It also presented evidence that the Claimant had expressed dissatisfaction with the slow divorce proceeding. TR1 at 78. Any weakening of the relationship the decedent caused by his continuing affair does not weigh heavily against the Claimant. *See Kennedy v. Container Stevedoring Co*., 23 BRBS 33 (1989). Even filing for divorce does not bar her recovery. *See Denton v. Northrop Corp.*, 21 BRBS 37 (1988). Although the Claimant conceded that she and the decedent "probably should have divorced long before," the facts support her belief that "neither one of us were ready to let go." TR1 at 194. The parties were not divorced before the decedent died. On balance, I find that the Claimant's behavior was not consistent with a conscious choice to terminate the marital bond. She is a widow as defined by the Act and has standing to bring this claim for death benefits.

Timeliness – the Claimant's awareness

The claim fails because it was filed too late. Section 13(a) of the Act requires that claims for death benefits be filed within one year after the employees' death, but tolls the statutory period until the time the claimant is aware, or by exercise of reasonable diligence should have

[7] The court specifically rejected the petitioners' contention that a permanent relationship with another man would constitute an absolute bar to compensation. *Matthews*, 512 F.2d at 945 & n. 8.

been aware, of the relationship between the death and the employment. 33 U.S.C.A. § 913(a) (West, 2007). The Claimant argues that Oregon state precedent controls when the statute of limitations should begin. Citing *Keller v. Armstrong World Industries, Inc*., 342 Or. 23, 147 P.3d 1154 (2006), she insists that a definite medical opinion, rather than her awareness, triggers the start date for the one year period she has to file her claim. I reject the contention for several reasons. As an interpretation of a state statute governing asbestosis claims, the *Keller* decision merits no precedential weight on a federal longshore claim. The circumstances of the worker's occupational illness in *Keller* required medical opinions to determine the etiology of the asbestosis, while this claim involves a straightforward death by traumatic injury.

The *Keller* court tolled the narrowly drawn Oregon statute of limitations[8] because conflicting medical reports could lead a reasonable juror to find that the "plaintiff lacked the ability to discover the cause of those conditions without a diagnosis from a medical professional." *Id*. at 32. This record contains a single toxicology report showing the decedent's blood alcohol level was .17 when he died. CXA 5 at 17. The police reports indicating that the decedent was driving too fast for the conditions of the road are undisputed. CXA 7. There was no need for an expert to analyze this death before a claim for widow's benefits could be filed. Although the medical reports eventually obtained in this case conflict (the Claimant's expert links the death to the knee injury, while the Employer's experts find no causal connection between them), the claim already had been filed by the time these reports were written.

It defies logic to toll the statutory period to file a claim until after a claim has been filed. If no claim need be filed until a widow obtains an unequivocal medical opinion, a beneficiary may file as late as he or she wants, so long as a doctor's opinion is obtained eventually. This circumvents the statutory period Congress outlined in Section 13(a) of the Act. The statutory period began when the Claimant became aware or should have been aware of the relationship between the decedent's work injury and death, just as Section 13(a) says. This issue is not controlled by the Rules of Decision Act.[9]

Presumption of timeliness

Section 20(b) of the Act provides a presumption that a claim was timely noticed, "in the absence of substantial evidence to the contrary." *See Stark v. Washington Star Co*., 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987). Once the Employer presents evidence that the Claimant filed her claim more than one year after she became aware of the relationship between the death and employment, the presumption drops from the case and the issue must be

[8] Or. Stat. § 30.907(1) (West, 2007) provides:

> A product liability civil action for damages resulting from asbestos-related disease shall be commenced not later than two years after the date on which the plaintiff first discovered, or in the exercise of reasonable care should have discovered, the disease and the cause thereof.

[9] 28 U.S.C.A § 1652 (West, 2007) provides:

> The laws of the several states, *except where* the Constitution or treaties of the United States or *Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (emphasis supplied)

determined by looking at the evidence as a whole. *See e.g. Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935).

The Employer asserts that the Claimant had linked the decedent's knee injury to his drinking, and the drinking to a potentially fatal car accident, even before one actually occurred. The Employer can prevail even without ascribing prescience to the Claimant. The Claimant observed that the decedent drank "a little bit" after the knee injury, but started drinking "a lot" after he was laid off. TR1 at 158, TR2 at 86. She explained, "he had been drinking a lot and driving and coming home drunk and so it's something that I was fearful of . . . ." *See* Claimant's deposition, December 9, 2004 ("Dec. Depo."). She later admitted that she was not surprised by the manner of his death "because of the heavy drinking pattern that had steadily developed and increased since his knee injury." January 17, 2005 affidavit ("Jan Aff."). This is substantial evidence that she was aware of the relationship between the decedent's work-related injury and death as soon as she learned about the accident. The presumption that she timely noticed and filed her claim fourteen months after the death therefore drops from the case and the question of timeliness must be settled by considering all the evidence.

Although the Claimant insists that her comment of no surprise was made in hindsight, during the hearing she reaffirmed that she had been concerned about his drinking and driving for months before the accident. TR1 at 186. She also testified, "no matter how many times you tell yourself that you aren't surprised….[o]r no matter how many times you might say that to your friends that you wouldn't be surprised if it happened, I can tell you that when it does happen, you're not prepared for it." TR1 at 163. This indicates that she had told herself and her friends before the accident that she would not be surprised by it. Pure hindsight is not involved.

The Claimant also argues that she met the statutory deadline even though she was not surprised when she heard how the decedent died because she was nonetheless so shocked that she "could not think rationally about whether his knee injury caused his drinking which resulted in his death or anything else about his death and the consequences" until several months had passed. Jan. Aff. She later testified that she did not consider the connection until her second attorney suggested it. TR1 at 187.

She offers the following evidence to corroborate the intensity of her grief. Leah Rothwell, the Claimant's sister, testified that the Clamant was a "wreck" emotionally and that she was incapable of making decisions for three to four months after the decedent's death. TR1 at 23-25. Ms. Rothwell remembered that the Claimant "came to and wanted to handle her own affairs" at the end of August, 2002, when the Clamant sold the family home in Portland. TR1 at 35. Rene Manning, the widow's friend, opined that the Claimant was not able to deal with her own affairs until September or October of 2002. TR1 at 56. The Claimant described her fog as, "I didn't really want to deal with anything, I didn't want to talk to anybody, I just wanted to be left alone." TR1 at 166.

I fully accept that the Claimant experienced shock and grief from her husband's traumatic death. There is inadequate proof that she suffered functional limitations in handling her affairs that impaired her ability to meet the one year statute of limitations, however. None of the testimony of the Claimant's friends and family shows her incapable of making the casual

connection between her husband's work injury and death for a year after he died. She actually made the connection as soon as she learned of the accident.

In addition, after the decedent's death but before she filed her claim for death benefits, the Claimant dealt with financial affairs in three significant ways. First, she sold her home at the end of August, 2002. Second, she telephoned a claims administrator at Liberty Northwest on December 13, 2002 to say she believed additional benefits were due for the knee injury. TR1 at 146-147. Third, she contacted the Employer's accounting department to protest the distribution of the money in his 401(k) deferred compensation account. EX 56 at 343. While the Claimant testified that she does not remember making these contacts and that if she made them, it was not by her own volition, I find this not credible based on her friends' testimony that she wanted to handle her own affairs by then. She had also written to Mr. Preston on December 27, 2002, because she believed the decedent's estate was entitled to greater benefits.

Grief is not by nature universally incapacitating. The Claimant's behavior indicates that she was grieving, but not incapable of handling her important business or financial affairs for the entire statutory period. She received no medical treatment or diagnosis of any mental dysfunction during this time. Gary A. Jacobsen, M.D., the Claimant's medical expert and a specialist in addiction medicine, opined that a lay person could not know that there could be a connection between the injury and the decedent's alcohol abuse. TR1 at 110. I give no weight to Dr. Jacobsen's opinion on this subject because no expert opinion, medical or otherwise, is required to link a work-related injury and death under the Act. Lay people commonly know of the causal relationships between these events when they file for death benefits. Consequently, none of this evidence favors the claim of timeliness.

Based on all the evidence, the balance between the Claimant's January 2005 affidavit, stating that she could not think rationally about the decedent's death and the consequences until several months had passed, and her December 2004 deposition and later hearing testimony in which she attributed the decedent's drinking to his knee injury, knew he might die of a alcohol-related car accident, and was not surprised when her prediction came true, tips in favor of the Employer. It is also notable that the January affidavit was filed after the Employer filed a motion for summary judgment, which detracts from its credibility because it appears to retract the previous admission. The Claimant had connected the decedent's knee injury with the car accident by the date of the crash. The claim is untimely unless it can be preserved by statutory or equitable tolling.

Statutory Tolling

Tolling pursuant to Section 30(f)

The Claimant argues that she is entitled to a presumption that the statute of limitations was tolled until the Employer complied with Section 30(a) of the Act. This section requires an employer to file a report with the Secretary of Labor upon knowledge or receipt of notice that an injury or death is work-related. If the employer knows of such a relationship but fails to report it, then the statute of limitations is tolled until the employer complies. 33 U.S.C.A § 30(f) (West, 2007). However, the Section 20(b) presumption of timeliness does not apply to whether an

employer has knowledge of the work-relatedness of an employee's death, for the purpose of triggering the Section 30(a) filing requirement. *Speedy v. General Dynamics Corp.*, 15 BRBS 352 (1983). The question of statutory tolling is therefore answered simply by the balance of the evidence.

Section 30(f) cannot be held to toll the one-year statute of limitations where that period had already run by the time the employer acquired relevant knowledge. *Keatts v. Mutual Ins. Co.*, 14 BRBS 605 (1982). The Employer's human resources director, Kirsten Alvares, declared that she was unaware of any claim for survivor benefits, based on the theory that the decedent's knee injury caused his death, until June 6, 2003, when the statutory deadline had already passed. EX 56 at 343. The decedent was not working there at the time of his death. There is no earlier evidence that the Employer knew of any relationship between the decedent's knee injury and his death. The Employer cannot be expected to file a report for a work-related death it knew nothing about. In the absence of any evidence that the Employer knew of this connection between the decedent's knee injury and fatal car accident but failed to timely report it, § 30(f) of the Act does not toll the limitations period of § 13(a).

Mental Competence

The Claimant is not entitled to statutory tolling provided under Section 13(c) of the Act because she was not mentally incompetent. She suffered grief, *i.e.*, a sense of loss and sadness when her husband died, but not to such an extent that a guardian of her person or of her property was appointed under Oregon law. Her friends testified that she could not make decisions, but there was no diagnosis or other evidence from a medical source that she received treatment for any identifiable mental impairment during any part of the year that she had to file her claim. Thus, there is no basis to conclude that she lost the ability to engage in rational thought and action, only that she was grieving as most survivors tend to do. As already discussed, she took significant action consistent with an ability to deal with her affairs.

Equitable Tolling

In the Ninth Circuit, the doctrine of equitable tolling excuses a claimant's failure to comply with time limitations when he or she "had neither actual nor constructive notice of the filing period." *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997). Relief also requires that the claimant act with "all due diligence" to preserve his or her cause of action. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000) (rejecting a claim for equitable tolling in a claim for invidious disability discrimination).

Once counsel is retained, tolling ceases because the client is charged with constructive knowledge of the law's requirements through her lawyer. *See, Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir. 1987) (time-barring a claim for wrongful discharge where the plaintiff consulted attorneys within the statutory period, but filed too late). *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002) is particularly instructive on the significance of retaining counsel. The court affirmed a summary judgment against a U.S. Postal Service employee who filed suit claiming that she was terminated in retaliation for complaining to her supervisors about sexual harassment by co-workers. Her Title VII action was dismissed because she had failed to exhaust administrative remedies within the agency, and failed to show her late

filings within the agency qualified for equitable tolling. A federal employee who believes she has been subjected to sexual harassment must contact an EEO counselor with a request for counseling within 45 days of the discriminatory event. 29 C.F.R. § 1614.105(a) (2006). Thereafter she must file a formal complaint with the agency after she receives a "right to file letter" from the agency. 29 C.F.R. § 1614.106 (2006). In her June 24, 2000 written request for EEO counseling, Ms. Johnson gave August 8, 1999 as the harassment date (far more than 45 days before her request), although elsewhere she said it happened on October 12, 1999 (also more than 45 days before her request). The Postal Service responded to her counseling request with a certified letter mailed to her home, obtaining a signed receipt showing delivery on August 4, 2000. The letter told her she had 15 days in which to file a formal EEO complaint with the agency. By that time she also had retained a lawyer. Her EEO complaint was not filed with the Postal Service until September 8, 2000, once again out of time.

Ms. Johnson professed she knew nothing of the 45-day requirement to seek counseling, a claim the magistrate judge rejected because employees were put on notice of the required procedures by posters displayed at the work site, and by a "Learner's Workbook" given to new Postal Service employees that contained a chart setting out the time required to perfect each step in an EEO complaint. *Id.* at 415. The certified mail receipt proved the notice telling her when any formal complaint was due had been delivered to her residence. The instruction in the letter was not crucial, however, for she was represented by a lawyer who should not have needed that prompting. *Id.* at 417. Because she missed multiple deadlines, each of which were dispositive, her claim was dismissed.

Two weeks into the statutory 52-week period to present a death benefits claim, the Claimant did not face legal issues on her own—she had retained Mr. Preston. Mr. Preston's affidavit shows that he knew the decedent's death was alcohol-related, but that no one "suggested in any way that [the decedent's] knee injury and the loss of his job with Cascade may have been a contributing factor to drinking, or even suggested that it was a possible factor." EX 60 at 400. He further explained that "[t]here was no evidence which would lead me to believe that the car crash was in any way related to his knee injury or any of its consequences." *Id*.

The Claimant's subsequent counsel, Mr. Robinowitz, argues that the statute should be tolled precisely because Mr. Preston did not know the history of the decedent's drinking problem; in other words, the Claimant cannot be charged with constructive knowledge if her attorney was not aware of the elements giving rise to this claim. Although a creative argument, this situation is no different from one where an entirely competent but unrepresented claimant fails to realize that he or she has a claim, which is not an acceptable reason to toll the limitations period. Consequently, there is no excuse for the late filing of the death benefits claim crafted by Mr. Robinowitz.

This claim is therefore time-barred. In view of the alternate holdings discussed in the next sections (that the evidence of a causal connection or contribution between the knee injury and the death from drunk driving two years later is too weak, and the Employer has a valid defense under § 3(c) of the Act due to the decedent's intoxication), it makes no difference that Mr. Preston did not make the claim that Mr. Robinowitz filed.

Causation

Section 20(a) of the Act creates an initial, rebuttable presumption that a claimant's disabling condition is causally related to his employment. 33 U.S.C.A. § 920(a) (West 2007); *see also Ramey v. Stevedoring Services of Amer.,* 134 F.3d 954, 959 (9th Cir. 1998). A claimant invokes the presumption with proof that he suffered harm and that work conditions could have caused, aggravated or accelerated it. *Kelaita v. Triple A Machine Ship*, 13 BRBS 326 (1981); *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991). An employer may overcome the presumption with substantial evidence that severs the assumed causal connection between the injury and employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir. 1976). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Sprague v. Director, O.W.C.P., U.S. Dep't of Labor*, 688 F.2d 862, 865 (1st Cir. 1982). When an employer meets its burden, the presumption falls from the case and causation is determined by evaluating the evidence as a whole. *Devine v. Atlantic Container Lines*, 25 BRBS 15, 21 (1991).

Dr. Jacobsen opined that the decedent's knee injury was causally related to his increasing use of alcohol that ultimately resulted in his death. CXA 12 at 37. He explained that the decedent had an inordinate amount of free time after he could no longer work. *Id*. Despite interests in things like his dog and the Corvette, Dr. Jacobsen explained that the decedent's life was "basically two things: his work and his family. And it seemed like for how much time he spent at work, work was more important than his family." CXA 16 at 48. Because of this unwanted free time, he determined that the decedent developed symptoms of depression and probably boredom, and began using alcohol more frequently after symptoms of depression developed. CXA 12 at 36. He concluded that alcohol was the primary cause of the decedent's death. *Id*. at 37.

Dr. Jacobsen linked the knee injury and increase in alcohol consumption by the absence of problematic use of any type of substance before the decedent was hurt. *Id.* at 36-7. Testimony from the Claimant, Ms. Weisgerber, Mr. Rothwell, and Mr. Churchill corroborates that the decedent rarely drank before the injury, but began drinking heavily afterwards. TR1 at 66, TR2 at 68. This is enough to shift the burden to the employer to rebut the causal connection.

The Employer presented the medical opinions of two doctors, Ronald Turco, M.D., a psychiatrist, and Brent Burton, M.D., a specialist in medical toxicology and occupational medicine. EX 58 at 349; TR1 at 121. Dr. Turco determined that poor judgment, rather than depression resulting from the work injury, caused the accident. EX 58 at 368. Dr. Burton found "no plausible connection between [the decedent's] knee injury and his death that occurred as a result of alcohol intoxication, traveling at a high rate of speed, and losing control of his automobile." EX 47 at 267. Because he does not mention loss of self esteem, chronic pain, and boredom specifically, the Claimant contends that Dr. Burton's report and testimony are not "sufficiently comprehensive" to rebut Dr. Jacobsen's opinion. However, Dr. Burton's conclusion, "[t]here is no linkage between a knee injury and [the decedent's] drinking behavior that led to the auto accident" dismisses all factors – there was nothing he found to connect the knee injury to the car accident. EX 47 at 267. This is enough. These reports overcome the presumption in favor of causation because they constitute substantial evidence. It is reasonable

to conclude, based on the context of a social gathering on the evening he died, that the decedent was intoxicated for reasons other than the work injury.

The Evidence as a Whole

The Claimant insists that the decedent's knee injury not only changed the decedent's livelihood, but also his mental state because of chronic pain, depression, inability to engage in physical activities, and lack of interests other than his former job. Mr. Churchill thought his friend became insecure because "his security was in his ability to be active." EX 55 at 334. Dr. Jacobsen explained that the decedent was "really like a fish out of water" after the injury. CXA 16 at 48. Although the decedent might have played games on his computer, Dr. Jacobsen opined that this kind of activity would not have been a satisfying way for the decedent to spend his time. CXW 16 at 49. Likewise, driving his Corvette and playing pool would take up only a limited amount of time. *Id*. at 50. The Claimant speculated that the decedent went out with his girlfriend just so he would have someone to drink with him; based on this theory, Dr. Jacobsen questioned the significance of this relationship because of the hunch that it revolved around drinking.[10] *Id.* at 51.

The Claimant also argues that Drs. Turco and Burton are not qualified to give an opinion on causes of alcohol addiction, under *Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 597 (1993) (requiring, pursuant to Rule 702 of the Federal Rules of Evidence, that an expert's testimony rest on a reliable foundation and be relevant to the task at hand). The *Daubert* decision is based in the federal trial judge's gate-keeping role in jury trials. I can evaluate the evidence in this record without the guardianship of some other authority. In *Daubert,* the Supreme Court explained that "pertinent evidence based on scientifically valid principles" satisfy these foundation and relevance standards. The Claimant asserts that Drs. Turco and Burton do not meet these standards because they do not specialize in addiction, Dr. Jacobsen's field. This is not a situation where a dermatologist is attempting to give an opinion about some fine point of pediatric nephrology or an ophthalmologist is attempting to testify about orthopedic wrist surgery. Dr. Jacobsen admitted that he spoke of the decedent's depressive symptoms as a generalist, not as a specialist in addiction. All the Employer's experts are qualified as specified under *Daubert*; their opinions are no less reliable than those of an addiction specialist. Moreover, the evidence does not persuade me that the decedent's drinking behavior rose to a level of addiction, despite its tragic consequence.

Dr. Jacobsen acknowledged that the record is devoid of diagnoses for depression or chronic-pain syndrome and that there is no evidence that the decedent sought treatment for problematic alcohol use. TR1 at 106. He also conceded that other factors, such as financial difficulty and separation from his wife of 30 years, could have influenced the change in the decedent's behavior. TR1 at 108. Relying on the lay-understanding of "depression," he explained that from a "generalist point of view" it is medically probable that the decedent was clinically depressed for a period of time after the knee injury and that he suffered from rapidly progressive alcoholism up until the time of his death. TR1 at 95, 107. He was not surprised by the absence of treatment for alcohol abuse because, he explained, the person affected usually

[10] Dr. Jacobsen later admitted that he had no way of knowing whether the girlfriend was involved in the decedent's drinking; instead he was "playing the odds" from his experience as an addiction specialist. CXW 16 at 55.

denies the problem and the decedent shared characteristics with those who find it difficult to admit symptoms commonly associated with personal weakness. CXA 12 at 36.

Dr. Turco conceded that it would be natural for the decedent to have some depressive symptoms following his knee injury, but he explained that there is "quite a difference" between those symptoms and a diagnosis of clinical depression. EX 58 at 351. He found that the decedent's social interaction, interest in the pool league, and in his car were inconsistent with someone who is clinically depressed. EX 58 at 355. He thought it significant that much of the decedent's drinking was in the context of social interactions. *Id*. Dr. Turco reasoned that the decedent may have started drinking because he had a lot of time on his hands and he agreed that boredom and lack of self esteem can be factors influencing a person to abuse alcohol. *Id*. at 368-69. He concluded, however, that boredom leading to alcohol abuse does not inevitably lead to death. *Id*. at 370.

Dr. Burton also recognized that the decedent may have had reason to feel depressed, but reiterated that these symptoms did not appear in the ante-mortem medical records. EX 47 at 267. He opined that depression does not necessarily lead to alcohol abuse. Causation often works in the opposite direction: the drinking can cause depression, for alcohol is a depressant. TR1 at 132. Based on the police report detailing the accident that took the decedent's life, Dr. Burton concluded there is little doubt that alcohol intoxication "was the only measurable risk factor responsible for the accident." EX 47 at 268.

On balance, there is insufficient evidence that the decedent suffered from clinical depression or alcoholism. The evidence shows that the decedent experienced symptoms of depression when he could no longer work at the shipyards, that he drank more after he stopped working for the Employer, and that he died while intoxicated. Only Dr. Jacobsen's post-mortem assessment concludes that the decedent was afflicted by depression as the mental health profession understands it, and alcoholism. He assumed that the absence of treatment indicated the presence of these diseases, but I am unwilling to treat an absence of proof as proof itself. Although family members were concerned about changes in the decedent's behavior, I regard it as highly probative that no diagnosis of either condition was made during his lifetime, nor were any sorts of treatments or interventions sought to ameliorate or curb them. I accept the conclusions of Drs. Turco and Burton—that neither depression nor alcoholism contributed to the decedent's unfortunate choice to drink and drive on the night of his death—as better-reasoned ones.

Medical reports support the idea that the decedent's knee continued to hurt after he had recovered from surgery, and that he received specific treatment to address his pain. Despite records of this pain, there is insufficient evidence that it developed into a chronic pain syndrome and there is no evidence that the decedent used alcohol because of or to alleviate it. On December 1, 2000, the decedent reported to Anthony Woodward, M.D., an orthopedic surgeon, that his pain was "constant," but Dr. Woodward did not conclude that he suffered from a chronic-pain condition. EX 19 at 83; CXB 18 at 31. The decedent's treating physician at the time, Dr. Noall, reported about a month later (on December 28, 2000) that the decedent's pain persisted after surgery, but that he was "pain free when he is not active, particularly on stairs." CXA 2. On March 31, 2001, John Di Paola, M.D., an orthopedic surgeon, gave an impression of

chronic right knee pain and stiffness. EX 23 at 95. He noted that the reason for on-going pain had not been explained satisfactorily and recommended that it be "pursued and investigated." *Id.* at 96. On June 16, 2001, the decedent explained to Jon Vessely, M.D., an orthopedic surgeon, that he experienced soreness and a chronic "toothache" type of sensation in his knee, but upon examination Dr. Vessely found no symptoms that suggested a complex regional pain syndrome. EX 25 at 102-103. On August 21, 2001, Dr. Noall recommended Hyalgan injections, which he explained were considered "palliative therapy" for symptomatic relief. EX 27 at 107; 28 at 110.

Dr. Noall ordered the Hyalgan injections with pain treatment in mind, but he also mentioned that he had not suggested this treatment before August of 2001 because the decedent had not come in complaining of pain. EX 28 at 110. Testimony by the decedent's friends and family suggests that he had a high tolerance for pain and rarely mentioned it. TR1 at 70. Consequently, the decedent's increased drinking behavior and pain symptoms correlate with his knee injury, but there is insufficient proof that they are causally related.

Inasmuch as the decedent's drinking behavior increased after he injured his knee, it is likely that he would not have increased his alcohol consumption but for the loss of his job. It is also clear that driving while intoxicated caused the decedent to flip his car. The record does not show, however, that the decedent was clinically depressed, bored, compelled by addiction, or overwhelmed by chronic knee pain when he made the decision to drink that night. To the contrary, he was in the company of friends and playing pool, which suggests none of those things. CXA 12 at 33. The decedent's choice to drink and imperil his life by drunk driving was not related to his injured knee. Even before the injury, the decedent tended to be a "white-knuckle driver," as Mr. Rothwell described him. TR1 at 164. The Claimant testified that he "liked to get people's reaction when he drove fast." TR2 at 91. She admitted that he received speeding tickets on occasion, and sometimes he would speed up if she asked him to slow down. *Id*. I find that the decedent's death was caused by the combination of his aggressive, even risk-taking style of sports car driving, coupled with alcohol consumption, not by his knee injury. I dismiss this claim for widow's benefits for lack of causation.

The Statutory Defense of Intoxication

Subsection 3(c) of the Act bars compensation where an injury was caused solely by intoxication. 33 U.S.C.A. § 903(c) (West, 2007). Subsection 20(c) provides a presumption in favor of the employee on this issue, which must be rebutted by the employer by substantial evidence that the injury was due to intoxication and that there is no other rational conclusion but that intoxication was the sole cause. 33 U.S.C.A. § 920(c) (West, 2007); *Sheridon v. Petro-Drive, Inc*., 18 BRBS 57, 60 (1986) (explaining that every hypothetical cause need not be negated). Although this defense is unnecessary in light of the procedural and causal flaws in the claim, the medical examiner's records report probable alcohol intoxication at the time of the decedent's death. EX 38 at 169. Police reports list the decedent's BAC at .17. EX 36 at 163. Dr. Burton opined that intoxication was the only measurable factor causing the death. EX 47 at 268. Dr. Jacobsen found that the circumstances of the accident were "consistent with alcohol impairment being the major contributing cause of this accident." CXW 12 at 33. This constitutes substantial evidence that the decedent died due to intoxication. The Employer also satisfied its burden of proof that nothing but intoxication caused this accident. Although the

medical examination shows that the decedent died of compression asphyxia, this was the result of flipping the car. EX 38 at 174. This type of accident had no connection with the decedent's work or workplace, there is no evidence that the knee injury compromised the decedent's driving ability, and none of the police reports or photographs of the accident scene include road conditions as contributors to the accident. EX 36, 37.

The Claimant insists that intoxication was not the sole cause of the accident because the decedent would not have begun drinking but for the knee injury. While I agree that the decedent drank more alcohol after the Employer laid him off, as explained above there is no indication that physical pain or a depressed or addicted state of mind brought on by the knee injury led him to drink too much on the night of the accident. I find that intoxication by the decedent's own volition was the sole cause of the death and the Employer therefore prevails on this defense as well.

Disability benefits for the decedent's knee injury

The Employer disputes the claim for total disability from July 18, 2001 to April 10, 2002. In the event that it prevails on this issue, it also argues that it is entitled to a credit for the difference between benefits already paid based on a 10% disability rating and what it asserts should have paid according to a 7% rating. I agree with the Employer that the decedent was not totally disabled, but find the 10% rating accurate. Therefore, no credit is due.

Total Disability

The Claimant is entitled to a presumption of total disability because she established that the decedent could not return to his regular job after April 19, 2000. *See Elliot v. C&P Tel. Co.,* 16 BRBS 89 (Jan. 20, 1984). It is the Employer's burden to overcome this presumption with proof of suitable alternative employment.[11] *See Clophus v. Amoco Prod.* Co., 21 BRBS 261 (1988) (explaining that when the claimant makes this *prima facie* showing, the burden shifts to employer). If the Employer rebuts the presumption with suitable alternative employment, then the burden shifts back to the Claimant to prove a diligent search and willingness to work.

[11] The Employer argues that it is questionable whether it bears the burden of persuasion to show suitable alternative employment in light of the Supreme Court decision, *Director, O.W.C.P. v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43, 48 (CRT) (1994) (rejecting the true doubt rule, which favors the claimant when the evidence offered by the parties is equally probative). *Greenwich Collieries* makes clear, however, that an employer must rebut a presumption in favor of a claimant or it will be accepted as true. *Id.* at 280; *see also General Const. Co. v. Castro*, 401 F.3d 963, 976 (9th Cir. 2005). The Court found that the Administrative Procedure Act, 5 U.S.C.A. § 556(d) (West, 2007), which provides that the proponent of a rule or order has the burden of proof, is "perfectly compatible" with placing the burden of persuasion on the claimant to establish a *prima facie* case. *Greenwich*, 512 U.S. at 281. Yet after a claimant has met this burden, it becomes the employer's responsibility to rebut it or concede the point. This has nothing to do with the true-doubt rule, which no longer is good law but would not have applied in any event to this presumption/rebuttal analysis. The Claimant is entitled to a presumption of total disability because she met her burden of persuasion when the Employer agreed that the decedent could not return to his regular work. The Court's rejection of the true doubt rule in *Greenwich Collieries* does not ease the Employer's burden to rebut the presumption with evidence of suitable alternative employment.

Williams v. Halter Marine Serv., 19 BRBS 248 (1987). The disability is partial, not total, if the Claimant cannot do so.[12] *See* 33 U.S.C. § 908(c).

Suitable alternative employment

Suitable alternative employment means jobs realistically and regularly available on the open market, in the geographical area where the injured worker resides, that he can compete for and perform given his age, education, work experience, and physical restrictions. *Bumble Bee Seafoods v. Director, O.W.C.P*., 629 F.2d 1327 (9th Cir. 1980); *Edwards v. Director, O.W.C.P.*, 999 F.2d 1374, 1375 27 BRBS 81 (CRT) (9th Cir. 1993); *Hansen v. Container Stevedoring Co*., 31 BRBS 155, 159 n.5 (1997). The reports of vocational counselors that specify job openings may be used to establish that suitable employment exists. *See Turney v. Bethlehem Steel Corp.,* 17 BRBS 232 (September 30, 1985).

On December 28, 2000, Dr. Noall released the decedent to light-duty work, but restricted him from more than 10 pounds of frequent lifting; 20 pounds of occasional lifting; and set his physical limitations to occasionally standing, walking, bending, stooping, pushing and pulling, and no climbing ladders or stairs.[13] EX 21 at 87; CXA 3. John Di Paola, M.D., an orthopedic surgeon who was hired by the Employer to do an independent medical examination but later became the decedent's treating physician, agreed with the restrictions placed by Dr. Noall. CXB 21 at 43. Based on the decedent's physical limitations, medical records, personnel file and deposition testimony, the Employer offered 2 parking-lot cashier/attendant jobs and 6 security guard jobs as work that would have been available to the decedent when his light duty ended. EX 51.

An employee's death does not alter the employer's burden to establish that suitable alternate employment was available during the period of the employee's life after an injury. *Mikell v. Savannah Shipyard Co.,* 24 BRBS 100, 107 (1990); *Eckley v. Fibrex and Shipping Co., Inc.,* 21 BRBS 120 (1988) (rejecting the argument that it is impossible to determine the extent of a deceased employee's disability following his death or for employer to establish the existence of suitable alternate employment after his death, even where the deceased employee had not achieved maximum medical improvement when he died). The Claimant contends that these jobs were not reasonably available because the employers were looking for employees who were stable, dependable, and would stay at the jobs for a while. TR2 at 131-132. She claims that the decedent would have offered none of those characteristics because he would have been

[12] The Claimant also asserts that the decedent's estate is entitled to total disability because he should have received a vocational evaluation and training within his lifetime. If that had happened, the decedent could have received total disability benefits while he retrained. *See General Const. Co. v. Castro*, 401 F.3d 963 (9th Cir. 2005). This argument depends on too many unknowns to succeed. The record does not establish why there was never a vocational analysis for the decedent, but retraining is discretionary with the Secretary. An administrative law judge cannot review that discretion. Without a vocational plan in place, moreover, it is impossible to determine whether a specific vocational training plan would have precluded work (they do not always do so), or its length. Consequently, hypothetical vocational rehabilitation does not serve as a basis to award total disability benefits for a period that cannot be determined with record evidence.

[13] Both vocational specialists agreed that occasional activity translates to 1/3 of a work day, or 2½ hours in an 8-hour shift. TR2 at 48; TR2 at 115.

dissatisfied as a parking-lot cashier/attendant or a security guard. The availability of a job does not depend on a worker's willingness to do it. The analysis focuses on the demand for employees for this kind of position in the open market. An injured worker's distaste for a position would not make it any less available.

Roy Katzen, the vocational rehabilitation counselor who evaluated the decedent's employability in the 2001 labor market, ascertained that the jobs analyzed below were available four years ago. He looked for positions tending to be "low-skill, low-physical, low-demand type of occupations that are often readily available on a consistent, pretty much continuous basis." TR2 at 56. He explained that consistent contact with these employers meant he spoke to them twice a year, on average. *Id*. He also referred back to prior labor market surveys that he had completed during that period of time to determine the availability of the jobs he relied on. Based on the general availability of these types of jobs and Mr. Katzen's consistent contact with these employers, I find that they were reasonably available during the relevant time of the decedent's life.

The Claimant argues that none of the jobs identified below were suitable because of the decedent's physical and mental limitations.[14] The Claimant's vocational expert, Andy Huckfeldt, opined that the decedent was capable of performing only modified-sedentary work, rather than the light duty per Dr. Noall's restrictions, because of "residuals from his chronic pain." CXB 34 at 85. He also asserted that the decedent's chronic pain could potentially impair his ability to be productive and to relate with supervisors and coworkers, especially in stressful situations. *Id*. Impairments in a worker's production, productivity or pace from chronic pain, or the ability to accept supervision or interact with co-workers or the public due to pain would have to be considered in evaluating the suitability of jobs. *See generally*, *Richardson v. Safeway Store, Inc*., 14 BRBS 855 (1982); *Mijangos v. Avondale Shipyards, Inc*., 19 BRBS 15 (1986) (finding pain can be a factor in disability assessments). The problem is that as a vocational expert, Mr. Huckfeldt cannot make medical diagnoses that chronic pain is present or assess the extent of the limitation chronic pain imposes. That data, like more common physical limitations on standing, sitting, walking, lifting, carrying, reaching, bending, etc. may come only from an appropriate medical expert.

Mr. Huckfeldt impermissibly reduced the decedent's work capacity due to his assumption of a chronic pain syndrome. Although the Claimant proved that the decedent's knee continued to hurt after his surgery, this is not enough to limit his work capacity to the modified-sedentary level. Dr. Noall opined that the decedent remained capable of performing light-duty work with a 20-pound lifting limit, occasional standing and walking and no climbing of ladders or stairs, up to and including his last visit with him on October 31, 2001. EX 33 at 116. By this time, the decedent had received Hyalgan injections to address his pain. According to the chart note documenting the third injection, Dr. Noall found that the decedent had "definitely improved" and

[14] In response, the Employer asserts that the Claimant cannot prevail based on any of the decedent's mental limitations because psychological injuries resulting from the Employer's legitimate personnel actions are not compensable. Citing to *Marino v. Navy Exchange*, 20 BRBS 166, 168 (1988), the Employer argues that the decedent's allegations of depression, chronic pain, and alcoholism resulted from being laid off, a legitimate personnel action. Here, however, the Claimant has filed for benefits resulting from a traumatic knee injury, not a psychological injury. Therefore, *Marino* does not apply and the Employer's argument is rejected.

the only additional restriction was for the decedent to avoid strenuous activities on the day of the injection and to excuse him from work for a period of 24 to 48 hours following the injection. EX 30 at 113. These entries in the medical record fail to support the contention that the decedent's employment opportunities should have been limited to sedentary duty.

The decedent complained of knee pain when Mr. Rothwell employed him to help deliver a vessel from Seattle to Portland. Mr. Rothwell testified that sea conditions were so rough that he "basically had to set [the decedent] in a chair, get him off his leg." TR1 at 70. He recalled that the decedent had a distinct limp, he was unable to go up and down the ladder [*i.e,* marine stairs], and that he complained his leg hurt. *Id*. While this suggests that pain prevented the decedent from doing this type of work, it also appears that this job was likely more strenuous than light duty, especially considering the rough sea conditions and the use of ladders, for Dr. Noall precluded use of ladders and stairs. Other than this incident, there is no evidence that pain would have impaired the decedent's productivity in light-duty employment or compromised his ability to relate to people on the job. It did not keep him from performing his post-injury, light-duty work for the Employer satisfactorily. It ended because the Employer had no more of that work, not for poor performance. I find that knee pain would not have prevented the decedent from completing other light-duty work.

The Claimant also argues that the parking-lot and security jobs would be too emotionally demoralizing for the decedent to maintain because he was overqualified for them; before his injury, the decedent had a fast-paced job with a great deal of decision-making, judgment and responsibility. TR2 at 108. Mr. Huckfeldt admitted that the decedent may have been physically capable of performing the jobs below, but he needed assistance to be able to make a successful long-term transition in the labor market. TR2 at 127. By the same token, Mr. Huckfeldt assumed that potential employers would be reluctant to hire someone of the decedent's age and background because he would not be satisfied or productive. TR2 at 108. Emphasizing the decedent's depressive symptoms and increased alcohol use, the Claimant insisted that the decedent would not have been able to obtain and maintain productive employment in even unskilled or semi-skilled jobs in the competitive labor market without vocational assistance and perhaps counseling to address alcohol abuse before he could benefit from vocational rehabilitation. CXB 34 at 86; TR2 at 101-02.

The Employer concedes that the jobs identified below required significantly lower reasoning, mathematics, and language skills than those demonstrated in the decedent's work history. Nonetheless, a claimant is not entitled to total disability benefits because a job is too easy. An employer satisfies its burden if the claimant is capable of performing the jobs identified and they are not sheltered employment. Whether the decedent would have liked working as a parking-lot cashier or security guard is irrelevant. *See Villasenor v. Marine Maintenance Industries, Inc*., 17 BRBS 99, 102 (1985) (explaining that a claimant is not entitled to total disability merely because he does not desire an alternate job).

With respect to the decedent's 56-years of age, Mr. Huckfeldt considered it a liability for seeking employment because employers are less likely to invest in training workers who cannot be expected to work more than 10 to 15 years. TR2 at 105. Mr. Katzen acknowledged that the decedent's age could have been a negative factor. TR2 at 131. This would be less likely to

count against the decedent for the specific jobs he identified, because some of those employers told him that they hire people considerably older than the decedent. *Id.* Within the security industry, there is somewhat of a preference for older employees because they tend to be more stable, dependable, and mature. *Id*. at 132. Considering that the jobs listed below require no prior experience or intensive training, hiring older workers does not involve a costly investment for these employers. I find that the decedent's age would not have made him an unattractive candidate in competing for these positions.

Mr. Huckfeldt emphasized the decedent's incapacity to work any job because of the increased alcohol use and depressive symptoms reported by the Claimant and other friends and family. No medical report addresses this issue and the decedent's light-duty supervisor, Mr. Herndon, testified that the decedent appeared neither drunk nor depressed at work. This is corroborated by the Claimant's testimony that the decedent started drinking more only after he had been laid off from light duty. Mr. Katzen considered the Claimant's concerns about the decedent's alcohol use. Dr. Jacobsen's psychological report did not say that alcohol use or abuse rendered the decedent unemployable. Mr. Katzen concluded that the drinking behavior would have no impact on the decedent's ability to work the jobs he identified. TR2 at 47-49; EX 51 at 280-81.

There was one incident, however, when the decedent's drinking interfered with a job. Mr. Rothwell recalled that when he called the decedent to complete the second delivery job he had hired him to do, the decedent backed out because he was not sober. Despite this testimony, the weight of the evidence suggests that the decedent drank when he was bored because he did not have a job to go to, or when he was socializing. Mr. Rothwell called the decedent to work because there was a mechanical problem with the boat and he had to wait for parts, an unforeseen situation. The decedent was not drinking while delivering the vessel, but beforehand when he was not working and likely unaware that his services would be called for. By the time of this second delivery, the decedent would also have known that this particular job was too physically demanding for him (recall that during the first delivery, Mr. Rothwell had to "get him off his leg"). There is a much stronger correlation between the decedent's drinking and the absence of work, rather than with drinking and working a light-duty job, which he was able to do for months without any sign to his employer of alcohol use or abuse. I cannot accept Mr. Huckfeldt's assertion that the decedent could not have held a light-duty job without vocational rehabilitation and counseling.

Having found no additional mental or physical barriers to the decedent's potential employment from July 18, 2001 until April 4, 2002, the jobs below must be realistically and regularly available, and meet the physical restrictions Dr. Noall set to qualify as suitable alternative employment. The Employer has shown that the decedent's age would not have kept him from competing for or performing them, and that he was capable of doing the work given his educational and work experience. All of the jobs were located in Portland, Oregon, so they meet the geography requirement.[15] For reasons discussed below, I find that the two parking-lot

[15] The Claimant contends that one of the security-guard employers below, Pro-Star, may not have operated in the Portland area from 2001-2002. Mr. Katzen's report does not list a distinct location for this employer, but he relies on market data for the Portland and Vancouver metropolitan areas. EX 51 at 295. Even in the event that this

cashier jobs (jobs 1 and 2 at City Center Parking and at Ace Parking) would have been suitable for the decedent, but the remaining jobs were unsuitable. The decedent was not totally disabled.

1) City Center Parking

This business employs a total of 450 employees; 70-90 of them perform cashier duties only. At the time of this survey, dated October 29, 2004, positions were available for attendants, cashiers, or a combination of the two. Applicants needed neither prior experience nor a high school diploma, but must pass a drug screening and background check. The cashiers generally need to remain seated or stand, but may alternate positions. Occasionally they may move plastic cones or signs. The wages at the time of the survey were $8.00 per hour. Mr. Katzen contacted this employer "numerous times during the past ten years" and has found consistent openings for both full and part-time positions. EX 51 at 291-92.

Mr. Katzen described the cashier job as one where the employee accepts money from the parking patron and stays in a booth. TR2 at 57. A parking attendant, in contrast, may move about the lot parking the cars. *Id*. Mr. Katzen admitted that he was unsure whether the decedent could perform the attendant job due to the knee injury. *Id*. Because it is uncertain whether the attendant job would have been limited to occasional walking and standing, I find that it would not have been suitable.

The cashier position comports with the light-duty restrictions set by Dr. Noall. This job enables the employee to sit, stand, or alternate positions. It would have been suitable for the decedent.

2) Ace Parking

This company offers cashier positions only and has grown dramatically over the past years because parking lots at the airport have expanded. The job requires basic math, reading, and customer service skills. Computer literacy is desirable. Drug screening and a background check are required. Employees can alternate sitting and standing and must lift a 15-20 pound cash box at the end of the shift. The wages at the time of the survey were $7.65 per hour. Mr. Katzen reported that the company continues to have steady openings, always accepts applications, and that when he contacted this employer in October of 2004 it was conducting interviews for several vacancies. EX 51 at 292-93.

The Claimant infers that the decedent may not have been able to pass a drug test because of his increased alcohol use, and Mr. Katzen conceded that alcohol could show up on a drug screen. TR2 at 54. Nonetheless, the record does not establish the frequency with which the decedent drank. It shows only that he drank more when he stopped working than he did before. The decedent had no history of failing drug tests. It is unreasonable to assume that he would fail the drug test required for this job.

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employer did not operate in the decedent's geographical area, the physical requirements of the Pro-Star positions exceeded his capacity, rendering those jobs unsuitable.

This cashier position fits within the limits set by Dr. Noall. I find that it would have been suitable for the decedent.

3) Securitas

This company has over 1,500 employees who provide security to industrial and commercial sites in Portland. Approximately 10% of the positions are stationary assignments; the remaining positions require foot patrol for 20-30 minutes and then sitting for 30 minutes. Physical demands include lifting 25 pounds rarely. An applicant's physical restrictions can be accommodated through site assignment. Inexperienced applicants are considered and the majority of jobs are swing or graveyard shift. The positions require that applicants pass drug screening, obtain state certification, and have a high school diploma or GED. Training is provided to fulfill state requirements and to help employees pass the requisite tests. At the time of the survey wages were $8.00 - $10.00 an hour and the company was hiring. EX 51 at 295-96.

Mr. Katzen reported that this employer has hired people who use canes for walking assistance and that physical restrictions can be accommodated. It is speculative whether this type of accommodation could have been made at the time the decedent would have sought employment. Considering that the basic requirements for this position – walking half of every hour and rarely lifting 25 pounds – exceed the decedent's physical limitations, I find that this job is not suitable.

4) St. Vincent de Paul

This non-profit agency provides training and employment placement for security personnel. At the time of the survey, Mr. Katzen found this agency had been in a "growth mode during the past two years." There is a two-week training, which costs $589 and involves passing eighth-grade competency exams. Vocational rehabilitation providers often cover the cost of the training and scholarships are available. Many of the jobs require significant amounts of standing and walking up to 30 minutes per hour. Lifting up to 30 pounds may be required. On occasion, stationary posts become open. Wages were $8.30 to $9.35 and there were positions open at the time of the survey for the training. Of the two most recent classes, 7 of 11 graduates were employed with this agency and the others found jobs with outside firms. EX 51 at 296-297.

It appears that the physical requirements for most of the posts offered through this agency would have exceeded the decedent's capability. It is uncertain when the sedentary positions would have been available. Thus, these employment opportunities also were unsuitable for the decedent.

5) American Commercial Security Services (ACSS)

This firm employs 150 people at industrial, commercial and residential sites. It will assist an applicant with training to obtain the required state certification; a high school diploma or GED is also required. Physical demands vary based on the assignment, but at least some walking is required for all the positions. Generally, an employee will perform a clock tour every two hours. This firm places employees at stationary posts as they occur. It continues to

advertise for new employees and accept applications. The person contacted at this firm explained that demand for these jobs changes on a regular basis. Wages were from $8.50 to $13.00 per hour. EX 51 at 297-98.

The stationary posts would have been suitable for the decedent, but their availability was uncertain. Although the decedent would have been capable of performing clock tours every two hours, it is unknown whether the tours would have been on a level surface or if hills or stairs would have been part of his rounds. Because of this uncertainty, I cannot find that this job is suitable.

6) Pro-Star Security (AAA)

This security company places employees at apartment complexes, malls, parking lots, manufacturing facilities and construction sites. Requirements include a high school diploma or GED, valid Oregon Drivers License, no felonies or serious misdemeanors during the past ten years, passed drug screening, and state certification. The company provides training to obtain certification. A majority of assignments require walking and standing for 50% or more of the time or driving a car, light truck or golf cart; all applicants must be able to perform this function and to lift 20 pounds occasionally. Full and part-time work was available at the time of the survey and wages were $7.45 to $7.50 per hour. EX 51 at 298.

This position requires physical capacities beyond the decedent's limitations. Every employee had to walk and stand for 50% of the time. It would have been unsuitable.

7) Allied Security

At the time of the survey this company was expanding and advertising current openings. A high school diploma or GED, state certification, background check, drug screening, and the ability to pass an exam are required. This company assists applicants to obtain certification. Physical demands include minimal lifting, alternating standing, walking, and sitting; some stationary assignments are available. Wages were $9.00 an hour. EX 51 at 299.

This position is also unsuitable because it is uncertain how long the decedent would have had to stand or walk.

8) Reliant Security

Mr. Katzen contacted this company numerous times from 1998 to 2004. At the time of the survey it had 40 employees and had full and part-time openings. New employees are on call and can advance to permanent and steady assignments. The assignments vary; prior part-time positions included entry control at an apartment complex with minimal walking, or significant walking to check entry security at a larger residential complex, or clock tours at a construction site. Applicants must have a high school diploma or GED and obtain state certification, for which the company will train and pay the $89 certification fee. This fee will be deducted from wages once the applicant is hired. Wages were $9.00 to $9.50 per hour.

The decedent would have been unable to perform the posts requiring significant walking, or those at construction sites because of the potential for uneven terrain, hills and stairs. He could have done the part-time positions with minimal walking, but it is uncertain whether they would have been available to him. Therefore, these positions are unsuitable.

Partial Disability

Dr. Vessely's June 16, 2001 report of the independent medical examination he conducted at the Employer's request rated the decedent's knee injury at 10% of the leg. CXB 23 at 51. He explained that the knee could have been rated either on a diagnostic basis, including the meniscectomy, or on the fact that the decedent had a 5-degree flexion contracture plus degenerative joint disease.[16] *Id*. The loss of flexion combined with the decedent's arthritic changes produced a higher rating.[17] CXB 27 at 57. He chose this result because the AMA guides specified that the maximum of the two ratings should be given to the injured worker. *See* GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 5th ed. (AMA, 2001). Dr. Noall concurred with Dr. Vessely's 10% rating. EX 26 at 106.

Dr. Di Paola also evaluated the decedent for the Employer, but later agreed to care for the decedent as his treating physician. CXB 30 at 61. He gave the decedent a 7% disability rating for his leg based on a cartilage interval of 3 mm. EX 31 at 115. He did not take the decedent's loss of motion or degenerative joint disease into account. Based on this omission, I find that Dr. Vessely's rating is the more accurate of the two, as it does the better job of considering function. Therefore, the decedent's injury rating remains at 10% of the leg. No credit to the Employer is due and the decedent's estate is entitled to additional benefits for the days following the Hyalgan injections.

Interest

The Claimant is entitled to interest on his permanent partial disability award, to make him whole for the delay in payment. *Foundation Constructors, Inc. v. Director, O.W.C.P.*, 950 F.2d 621, 625 (9th Cir. 1991). The parties agree that interest began to run 14 days after each of the disability payments were claimed or due. This comports with *Wilkerson v. Ingalls Shipbuilding, Inc*., 125 F.3d 904, 908 (5th Cir. 1997), and is therefore reasonable. The Employer must pay this interest as agreed.

ORDER

It is ORDERED that:

1. The Employer pay the Claimant $785.42 in temporary partial disability payments for the periods of April 19, 2000 through May 2, 2000; and December 27, 2000 through December 28, 2000, plus interest to date.

[16] Dr. Noall reported degenerative joint disease in his October 19, 2001 report. CXB 28 at 59.

[17] *See* Table 17-2, The Guide to the Appropriate Combination of Evaluation Methods, at p. 526.

2. The Employer pay the Claimant $772.50 in temporary total disability payments for the periods of October 1 and 2, 2001; October 19-20, 2001; and October 31 and November 1, 2001, plus interest to date.

3. The Employer pay the Claimant an additional $772.50 of temporary total disability, covering the six days the decedent received Hyalgan injections, plus interest to date.

4. Accrued interest is payable at the rate in effect pursuant to 28 U.S.C.A. § 1961 (West, 2007), as of the date this compensation order is issued by the District Director.

5. All benefit computations and other calculations necessary to carry out this Order are subject to verification and adjustment by the District Director

6. The Claimant is entitled to attorney's fees. A fee petition that comports with 20 C.F.R. § 702.132 shall be filed in 21 days from the date this order is served by the District Director. The petition should demonstrate the exercise of billing judgment to account for the hours devoted to issues on which the Claimant did not prevail. The Employer/Carrier may file objections within 14 days, and the Claimant shall have a like time to file a reply. The parties shall then meet to resolve their objections, and file a joint report within 21 days after the reply has been filed, that describes the objections resolved or narrowed by their negotiations, and identifies the objections that remain to be decided.

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William Dorsey
Administrative Law Judge